In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 325

LOUIS A. NEGRE

vs.

STANLEY R. LARSEN, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of the Executive Board of the National Federation of Priests' Councils—Amicus Curiae

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

RELIGIOUS AUTHORITIES

OTHER AUTHORITIES

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INTEREST OF THE AMICUS

The National Federation of Priests' Councils is an association founded in 1968 which represents 129 member councils in 120 dioceses of the Catholic Church in the United States. The member councils in turn represent approximately 33,000 duly ordained Catholic priests. The members of the Executive Board which governs the Federation are priests who are elected to office by the House of Delegates, a body consisting of the elected representatives from the

member councils. The Executive Board is mandated to carry out the will of the House of Delegates and to take whatever other actions it judges to be necessary for achieving the purposes of the Federation.

The House of Delegates adopted a policy statement at their Second Annual Convention, March 26, 1969, which included the following passage:

> "Whereas, the National Hierarchy has recommended 'a modification of the Selective Service Act making it possible . . . for so-called selective conscientious objectors to refuse . . . to serve in wars which they consider unjust or in branches of service . . . which would subject them to the [denial of] deeply held moral convictions about indiscriminate killing.'
>
> "Whereas, the National Hierarchy hopes that 'in the all-important issue of war and peace, all men will follow their consciences.'
>
> "Be it resolved that:
>
> (1) The member councils of the National Federation of Priests' Councils work to guarantee that competent counseling be made available in their dioceses to young men who in conscience cannot take part in a war they consider immoral.
>
> (2) That we respect the consciences of those people who are compelled to take symbolic responsible steps to protest the United States involvement in any war which they consider in conscience to be unjust."

Priests by their vocation are called to counsel, train and guide the faithful in matters pertaining to faith, morals and the formation of conscience. Pope Paul VI and the Second Vatican Council gave the following instruction to priests in the *Decree on the Ministry and the Life of Priests,* paragraph 6:

> "Therefore, as educators in the faith, priests must see to it, either by themselves or through others, that

the faithful are led individually in the Holy Spirit to a development of their own vocation as required by the gospel, to a sincere and active charity, and to that freedom with which Christ has made us free. Ceremonies however beautiful, or associations however flourishing, will be of little value if they are not directed toward educating men in the attainment of Christian maturity.

"To further this goal, priests should help men see what is required and what is God's will in the great and small events of life."

In counseling draft-aged youth, the priest is often caught in a painful dilemma when confronted with a situation in which the young Catholic feels that his direct or indirect participation in a particular war would be immoral. In guiding the young man to a personal decision on the matter, the priest is placed in the dubious position of having to counsel his subject to disregard the law in order to follow a belief which results from religious training, or to disregard that belief in order to follow the law.

While the individual may be judged by others objectively in error in his determination whether or not a particular war does or does not in fact meet the tests of his religion to permit participation, the individual nevertheless is in religious duty bound to follow his conscience.

The interest of priests in the present case is particularly sharp because they are in jeopardy of prosecution for counseling Catholic selective objectors to refuse military service, if the selective service laws are construed to disqualify Catholic selective objectors from exemption. For the Catholic religion unequivocally requires priests to counsel the faithful to follow conscience in respect of military service, whether or not civil law makes any provision for following conscience.

That such counseling creates a direct interest in priests may be seen from *Gara v. United States,* 178 F.2d 38 (2d Cir. 1949) affirmed by an equally divided court, 340 U.S. 857 (1950), and *Warren v. United States,* 177 F.2d 596 (10 Cir. 1949) cert. denied 338 U.S. 947.

Warren, a Unitarian and a physician, was convicted for counseling his stepson to refuse induction.

Gara, Dean of Men at Bluffton College, had himself refused to register in the First World War and considered it his religious duty to oppose all forms of cooperation with war. He was present when Rickert was arrested. Government witnesses testified, among other things, that appellant said to Rickert at that time, "Do not let them coerce you into changing your conscience. . . ." 178 F.2d at 39.

It is established that Catholic priests have a religious duty to all members of the faith to counsel them "Do not let them [the government or anyone else] coerce you into changing your conscience. . . ."

If it is a felony to so counsel, then each priests who teaches Catholic doctrine to follow conscience in respect of military service is guilty of a felony under Section 12 of the Military Selective Service Act of 1967, 50 U.S.C. App. § 462.

Mindful of the concerns of priests who are religious counselors and in furtherance of the above resolution of the House of Delegates, the Executive Board of the National Federation of Priests' Councils has obtained the consent of the parties in this case to offer this brief as a friend of the court.

THE CATHOLIC PASTORAL TEACHING IN RESPECT OF OBEDIENCE TO CONSCIENCE AND PERFORMANCE OR REFUSAL TO PERFORM MILITARY SERVICE.

The *Decree on the Pastoral Office of Bishops* in the Church called on "the bishops of a given territory or

nation [to] jointly exercise their pastoral office to promote the greater good which the Church offers mankind . . ." (Section 38).

Pursuant to this instruction the Bishops of the United States met in canonical body and issued a joint pastoral letter on November 15, 1968, entitled *Human Life in Our Day.*

"We call upon American Catholics to evaluate war with that "entirely new attitude" for which the council appealed and which may rightly be expected of all who, calling themselves Christians, proclaim their identity with the Prince of Peace. We share with all men of good will the conviction that a more humane society will not come "unless each person devotes himself with renewed determination to the cause of peace" (n. 77). We appeal to policy makers and statesmen to reflect soberly on the council teaching concerning peace and war, and vigorously to pursue the search for means by which at all times to limit and eventually to outlaw the destructiveness of war.

"We join wholeheartedly in the council's condemnation of wars fought without limitation. We recognize the right of legitimate self-defense and, in a world society still unorganized, the necessity for recourse to armed defense and to collective security action in the absence of a competent authority on the international level and once peaceful means have been exhausted. But we seek to limit warfare and to humanize it, where it remains a last resort, in the maximum degree possible.

Continuing, the conference recognized:

"Meanwhile we are gratefully conscious that 'those who are pledged to the service of their country as members of its armed forces should regard themselves as agents of security and freedom on behalf of their people. As long as they fulfill this role properly, they are making a genuine contribution to the establishment of peace' (Gaudium et Spes, 79)".

Recognizing that Catholics may indeed engage in military service, but only when they fulfill the role properly, the letter then goes on to spell out the conditions under which military service would not be proper for a Catholic, and under which a Catholic must, obedient to conscience and his religious training and belief, refuse to perform military service:

> "Nor can it be said that such conscientious objection to war, as war is waged in our times, is entirely the result of subjective considerations and without reference to the message of the gospel and the teaching of the church; quite the contrary, frequently conscientious dissent reflects the influence of the principles which inform modern papal teaching, the Pastoral Constitution and a classical tradition of moral doctrine in the church, including, in fact, the norms for the moral evaluation of a theoretically just war.
>
> • • •
>
> "As witnesses to a spiritual tradition which accepts enlightened conscience, even when honestly mistaken, as the immediate arbiter of moral decisions, we can only feel reassured by this evidence of individual responsibility and the decline of uncritical conformism to patterns some of which included strong moral elements, to be sure, but also included political, social, cultural and the like controls not necessarily in conformity with the mind and heart of the church.
>
> • • •
>
> "If war is ever to be outlawed, and replaced by more humane and enlightened institutions to regulate conflicts among nations, institutions rooted in the notion of universal common good, it will be because the citizens of this and other nations have rejected the tenets of exaggerated nationalism and insisted on principles of nonviolent political and civic action in both the domestic and international spheres.

"We therefore join with the Council Fathers in praising

> 'those who renounce the use of violence in the vindication of their rights and who resort to methods of defense which are otherwise available to weaker parties, provided that this can be done without injury to the rights and duties of others or of the community itself' (n. 78).

"It is in this light that we seek to interpret and apply to our own situation the advice of the Vatican Council on the treatment of conscientious objectors. The council endorsed laws that

> 'make humane provision for the care of those who for reasons of conscience refuse to bear arms, provided, however, that they accept some other form of service to the human community' (n. 79).

"The present laws of this country, however, provide only for those whose reasons of conscience are grounded in a total rejection of the use of military force. This form of conscientious objection deserves the legal provision made for it, but we consider that the time has come to urge that similar consideration be given those whose reasons of conscience are more personal and specific.

"We therefore recommend a modification of the Selective Service Act making it possible, although not easy, for so-called selective conscientious objectors to refuse—without fear of imprisonment or loss of citizenship—to serve in wars which they consider unjust or in branches of service (e.g., the strategic nuclear forces) which would subject them to the performance of actions contrary to deeply held moral convictions about indiscriminate killing. Some other form of service to the human community should be required of those so exempted.

"Whether or not such modifications in our laws are in fact made, we continue to hope that, in the all-

important issue of war and peace, all men will follow their consciences. We can do no better than to recall, as did the Vatican Council, 'the permanent binding force of universal natural law and its all embracing principles,' to which 'man's conscience itself gives ever more emphatic voice.' "

Indeed the duty of the priests to teach obedience to conscience is as binding as the duty of the faithful to follow conscience.

"Then Peter and the other apostles answered and said, We ought to obey God rather than men." Acts 5, 29

Referring to that text, Pope John XXIII of happy memory taught:

"Since the right to command is required by the moral order and has its source in God, it follows that, if civil authorities pass laws or command anything opposed to the moral order and consequently contrary to the will of God, neither the laws made nor the authorizations granted can be binding on the consciences of the citizens, since God has more right to be obeyed than men." Pacem in Terris, paragraph 51, April 11, 1963.

We close this very summary view of the Catholic doctrine of conscience by noting that the Catholic is morally bound to follow conscience when it has been prayerfully and properly formed, even though the individual may be judged objectively in error.

"Where there is such ignorance that man is in no way to blame for the ignorance itself, he is wholly free from blame." (In II Sent., dist. 22, q.2, art.2).

The teaching of St. Thomas Aquinas in rational philosophy and theology is adopted as authoritative for the

Church in Canon 1366 par. 2 of the *Codex Juris Canonici.* St. Thomas teaches very clearly:

> "If a person acts against his conscience, he sins." Quodlib. 3, 27; cf. II *Sent.* dist. 22,q. 2, art. 2; *Summa Theologica* (1-2, q.19, art. 5).

We turn from a summary of the Catholic religious duty to obey conscience as it perceives the laws of God, in case of conflict with civil law, to examine the Constitution and civil law involved in the present case.

STATEMENT OF THE CASE

Louis A. Negre, the appellant, was born and raised a Catholic. He submitted to induction into the Army under the Military Selective Service Act. After completing basic and advanced infantry combat training, Negre concluded that under his Catholic religious training and belief, he could not participate in any form in the war in Vietnam, and applied for discharge from the Army as a conscientious objector.

The application for discharge was denied upon the ground that the Catholic religious doctrine in which Negre believed prohibited participation not in all wars but only in certain wars, such as wars of aggression or wars fought without limitation.

Negre was thereupon ordered to service in Vietnam, and brought habeas corpus for discharge from the Army. The District Court for the Northern District of California denied Negre's petition for habeas corpus and the Court of Appeals for the Ninth Circuit affirmed. The Supreme Court granted certiorari.

QUESTIONS PRESENTED

1. Did Congress in enacting Section 6(j) intend to discriminate against members of religions prohibiting par-

ticipation in some wars, but not in all conceivable wars, and in favor of total pacifists?

2. If Congress intended to limit exemption from military service to persons who subscribe to belief in religions which teach total pacifism, does such discrimination violate the Free Exercise Clause and the Establishment of Religion Clause of the First Amendment, and violate the Fifth Amendment's guarantee of due process and equal protection of law for members of all religions without discrimination based upon religious doctrine?

ARGUMENT

1. No intent may be imputed to Congress to discriminate against members of religions such as the Catholic religion upon the grounds of doctrine. Therefore, Section 6(j) should be construed to exempt Catholic selective conscientious objectors from military service, equally with members of traditional pacifist sects.

Section 6(j) provides in pertinent part:

> "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reasons of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term 'religious training and belief' does not include essentially political, sociological, or philosophical views, or a merely personal moral code."

The legislative history of section 6(j) of the current Selective Service Act demonstrates that it stems from a paraphrase of the dissent of Chief Justice Hughes in *United States v. Macintosh* 283 U.S. 605 at 633 (1931):

> "... in the form of conscience, duty to a moral power higher than the state has always been maintained. The reservation of that supreme obligation, as a matter

of principle, would unquestionably be made by many of our conscientious and law-abiding citizens. The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation." (Emphasis added).

Section 6(j) of the Selective Service Act of 1948 provided:

"(j) Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. *Religious* training and belief in this connection means an individual's *belief in a relation to a Supreme Being involving duties superior to those arising from any human relation,* but does not include essentially political, sociological, or philosophical views or a merely personal moral code." (Emphasis added).

Senate Report 1268, 80th Cong.2d Sess. 1989, 2002 (1948) states:

"This section reenacts substantially the same provisions as were found in subsection 5(g) of the 1940 act. Exemption extends to anyone who, because of religious training and belief in his relationship to a Supreme Being, is conscientiously opposed to combatant military service or to both combatant and noncombatant military service. (See *United States v. Berman,* 156 F.2d 377, certiorari denied, 329 U.S. 795)."

United States v. Berman, 156 F.2d 377 at 381 quoted the identical passage from *United States v. Macintosh* which was adopted by Congress in the 1948 Act. Indeed, *Berman* emphasized the intent of Congress to exempt men refusing military service obedient to their understanding of religious command, as opposed to philosophical, social or political policy not expressing the command of God, a Supreme Being, or a power higher than the state.

It should next be noted that the opinion of Chief Justice Hughes in *United States v. Macintosh,* adopted by the Congressional paraphrase quoted, involved specifically a selective or just war conscientious objector:

> ". . . he explained that he was not willing 'to promise beforehand' to take up arms, 'without knowing the cause for which my country may go to war' and that 'he would have to believe that the war was morally justified.' He declared that 'his first allegiance was to the will of God;' that he was ready to give to the United States 'all the allegiance he ever had given or ever could give to any country, but that he could not put allegiance to the government of any country before allegiance to the will of God.'" 283 U.S. at 631.

The opinion of Chief Justice Hughes, adopted by paraphrase in the 1948 Selective Service Act, is worth quoting at length because he correctly outlines the uniform intention of Congress from the earliest days of the union to recognize religious training and belief, and to refrain from imposing any religious test as a condition of disability or benefit imposed by the government.

> "It goes without saying that it was not the intention of the Congress in framing the oath to impose any religious test.
>
> • • •
>
> But the long-established practice of excusing from military service those whose religious convictions oppose it confirms the view that the Congress in the terms of the oath did not intend to require a promise to give such service. The policy of granting exemptions in such cases has been followed from colonial times and is abundantly shown by the provisions of colonial and state statutes, of state constitutions, and of acts of Congress."

Continuing, Chief Justice Hughes emphasized the recognition uniformly extended by Congress to religious scruple

against bearing arms upon the grounds of higher duty in conscience to God:

> "The battle for religious liberty has been fought and won with respect to religious beliefs and practices, which are not in conflict with good order, upon the very ground of the supremacy of conscience within its proper field. . . . There is abundant room for enforcing the requisite authority of law as it is enacted and requires obedience, and for maintaining the conception of the supremacy of law as essential to orderly government, without demanding that either citizens or applicants for citizenship shall assume by oath an obligation to regard allegiance to God as subordinate to allegiance to civil power. The attempt to exact such a promise, and thus to bind one's conscience by the taking of oaths or the submission to tests, has been the cause of many deplorable conflicts. The Congress has sought to avoid such conflicts in this country by respecting our happy tradition. In no sphere of legislation has the intention to prevent such clashes been more conspicuous than in relation to the bearing of arms."

Finally, Chief Justice Hughes squarely addressed the question of selective conscientious objection, or objection only to bearing arms in wars found to be unjust under religious training and belief:

> "Nor is there ground, in my opinion, for the exclusion of Professor Macintosh because his conscientious scruples have particular reference to wars believed to be unjust. There is nothing new in such an attitude. Among the most eminent statesmen here and abroad have been those who condemned the action of their country in entering into wars they thought to be unjustified. Agreements for the renunciation of war presuppose a preponderant public sentiment against wars of aggression. If, while recognizing the power of Congress, the mere holding of religious or conscientious scruples against all wars should not disqualify a citizen

> from holding office in this country, or an applicant otherwise qualified from being admitted to citizenship, there would seem to be no reason why a reservation of religious or conscientious objection to participation in wars believed to be unjust should constitute such a disqualification." 283 U.S. at 635.

The Supreme Court has repeatedly acknowledged the recognition of religious belief uniformly expressed under our Constitution:

Girouard v. United States, 328 U.S. 61 (1945) adopted Chief Justice Hughes' dissent in *Macintosh* as the correct view of the intent of Congress in the immigration law. The court declared:

> "The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle." 328 U.S. at 68.

In *United States v. Seeger,* 380 U.S. 163 at 169-170 (1965) held:

> "Chief Justice Hughes, in his opinion in *United States v. Macintosh,* 283 U.S. 605, 75 L.ed. 1302, 51 S.Ct. 570 (1931) enunciated the rationale behind the long recognition of conscientious objection to participation in war accorded by Congress in our various conscription laws when he declared that 'in the forum of conscience, duty to a moral power higher than the State has always been maintained.' At 633, 75 L.ed. at 1315 (dissenting opinion). In a similar vein Harlan Fiske Stone, later Chief Justice, drew from the Nation's past

when he declared that 'both morals and sound policy requires that the state should not violate the conscience of the individual. All our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state. So deep in its significance and vital, indeed, is it to the integrity of man's moral and spiritual nature that nothing short of the self-preservation of the state should warrant its violation; and it may well be questioned whether the state which preserves its life by a settled policy of violation of the conscience of the individual will not in fact ultimately lose it by the process.' Stone, The Conscientious Objector, 21 Col. Univ. A 253, 269 (1919).

"Governmental recognition of the moral dilemma posed for persons of certain religious faiths by the call to arms came early in the history of this country. Various methods of ameliorating their difficulty were adopted by the Colonies, and were later perpetuated in state statutes and constitutions. Thus by the time of the Civil War there existed a state pattern of exempting conscientious objectors on religious grounds." 380 U.S. at 169-170.

Whatever may be the limits of Constitutional and Congressional recognition of non-religious conscientious objection, all justices of the Supreme Court found common ground in *Welsh v. United States,* U.S., 38 L.W. 4486 (1970), that Congress intended to exempt from military service men who objected based upon their religious training and belief.

Mr. Justice Harlan concurring in the result on constitutional grounds stated:

> "The policy of exempting religious conscientious objectors is one of long-standing tradition in this country and accords recognition to what is, in a diverse and 'open' society, the important value of reconciling individuality of belief with practical exigencies whenever

possible. See *Girouard v. United States*, 328 U.S. 61 (1946). It dates back to colonial times and has been perpetuated in state and federal conscription statutes. See Mr. Justice Cardozo's separate opinion in *Hamilton v. Bd. of Regents, Supra*, 293 U.S., at 267; *United States v. Macintosh*, 42 F.2d 845, 847. That it has been phrased in religious terms reflects, I assume, the fact that ethics and morals, while the concern of secular philosophy, have traditionally been matters taught by organized religion and that for most individuals spiritual and ethical nourishment is derived from that source. It further reflects, I would suppose, the assumption that beliefs emanating from a religious source are probably held with great intensity." 38 L.W. at 4496.

Mr. Justice White in his dissent, joined by the Chief Justice and Mr. Justice Stewart noted:

"Congress may have granted the exemption because otherwise religious objectors would be forced into conduct which their religions forbid and because in the view of Congress to deny the exemption would violate the Free Exercise Clause or at least raise grave problems in this respect.

* * *

"Legislative exemptions for those with religious convictions against war date from colonial days. As Chief Justice Hughes explained in his dissent in *United States v. Macintosh*, supra, at 633, the importance of giving immunity to those having conscientious scruples against bearing arms has consistently been emphasized in debates in Congress and such draft exemptions are 'indicative of the actual operation of the principles of the Constitution.' However this Court might construe the First Amendment, Congress has regularly steered clear of free exercise problems by granting exemptions to those who conscientiously oppose war on religious grounds. * * * The power to raise armies must be

exercised consistently with the First Amendment which, among other things, forbids laws prohibiting the free exercise of religion. It is surely essential therefore — surely 'necessary and proper' — in enacting laws for the raising of armies to take account of the First Amendment and to avoid possible violations of the Free Exercise Clause." 38 L.W. at 4497.

Mr. Justice Blackmun, Circuit Justice in *United States v. Levy,* 419 F.2d 360 (8th Cir. 1969) joined in an opinion broadly construing "religious training and belief" under the Selective Service Act. In the case of *In re Weitzman,* F.2d, 38 L.W. 2549 (8th Cir. 1970) in asserting the Constitutionality of distinguishing between non-religious and religious conscientious objection Justice Blackmun emphasized:

> "The religious training and belief connection with conscientious objection came into the statute not as an establishment of religion but as a legislative accommodation of religious freedom. In the primary Seeger opinion, Mr. Justice Clark outlined the efforts of colonial, state, and federal governments to ameliorate the plight of persons of various faiths when called to bear arms. 380 U.S. at 169-73. It is fair to say that in the light of history, § 377(a) is another example of what Mr. Chief Justice Hughes referred to as 'our happy tradition' of avoiding conflicts between belief and governmental necessity. *U.S. v. Macintosh,* 283 U.S. 605, 633-35 (1931).

Catholic conscientious objection rests precisely upon the ground emphasized by the Supreme Court, to wit, religious belief that conscience in representing God, has more right to be obeyed than any law contrary to conscience:

> "Since the right to command is required by the moral order and has its source in God, it follows that, if civil authorities legislate for or allow anything that is contrary to that order and therefore contrary to the

> will of God, neither the laws made nor the authorizations granted can be binding on the consciences of the citizens, since God has more right to be obeyed than men." (Pope John XXIII Pacem in Terris, page 142a, April 11, 1963).

In *Sicurella v. United States,* 348 U.S. at 385, 388 (1955) the defendent was denied classification as a conscientious objector on the recommendation of the Department of Justice.

The Supreme Court dismissed the Department of Justice construction of the Act with the severe comment:

> "Granting that these articles picture the Jehovah's Witnesses as anti-pacifists extolling the ancient wars of the Israelites and ready to engage in a 'theocratic war' if Jehovah so commands them, and granting that the Jehovah's Witnesses will fight at Armageddon, we do not feel this is enough. The test is not whether the registrant is opposed to all war, but whether he is opposed on religious grounds, to *participation* in war. [Emphasis in original.] 348 U.S. at 390-391.

Catholics, like Jehovah's Witnesses, follow God's commands over those of man; and Catholics as set out in Negre's application explicitly characterize conscience as representing the voice of God. If participation in the war violates the Catholic's conscience, Catholic doctrine is clear that the individual Catholic has a duty to comply with his own conscience and refuse military service.

Appellant in this case is no more required to become a Jehovah's Witness to qualify for exemption from military service than he is required to become a Quaker: The First Amendment affords equal protection in the exercise of their religious belief when—in refusing military service which would violate conscience—the Catholic's conduct is the same as that of the Jehovah's Witness or the Quaker's.

Since the authoritative construction by the Supreme Court in *Sicurella* that the words "in any form" modify "participation" and not "war", Congress has amended Section 6 of the Selective Service Act in 1957, 1958, 1961, 1962, 1963, 1964 and 1967. Upon each reenactment of Section 6(j), Congress retained the same word order involved in *Sicurella*, thus, by implication, ratifying the construction of Section 6(j) in *Sicurella*.

For the reasons stated, the construction of Section 6(j) of the Selective Service Act proposed by the government to discriminate against Catholics upon account of the statement of the Catholic religious doctrine is unsound and should be rejected. On the contrary, Section 6(j) should be construed to afford Catholics refusing military service obedient to conscience discharge from military service. Congress has not meant to put Catholics like Louis Negre to the hard and heroic choice of a Franz Jagerstatter.

2. The Constitution requires the Army to discharge Catholic conscientious objectors under the same circumstances as it discharges members of traditional pacifist sects, without discrimination against the Catholic objectors based upon the Catholic statement of religious doctrine in respect of war.

Any law or regulation which seeks to impose disability or punishment upon an individual solely for his religious beliefs and not for his conduct is unconstitutional as a violation of the First and Fifth Amendments. The foregoing proposition is so well established by the history of the Constitution and the prior decisions of the Supreme Court as to seem almost self-evident today.

For example, *Zorach v. Clauson*, 343 U.S. 306 at 313-314 (1952) declared:

> "We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom

> to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary * * * The government must be neutral when it comes to competition between sects. It may not thrust a sect on any person. * * *"

In *Walz v. Tax Commission,* 25 L.Ed.2d 697 (1970) the Supreme Court just reaffirmed the foregoing proposition.

The construction of Section 6(j) of the Military Selective Service Act of 1967 urged by the government in the present case, however, would constitute an unconstitutional discrimination against Catholic conscientious objectors solely for their doctrine.

Section 6(j) provides in pertinent part:

> "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reasons of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term 'religious training and belief' does not include essentially political, sociological, or philosophical views, or a merely personal moral code."

The sincere Catholic objector is "conscientiously opposed to participation in war in any form" in the war in which he is called upon to serve and to which he objects. The authoritative religious teaching of the Catholic Church set out previously in this brief makes it clear that the Catholic has a religious duty to refuse military service in certain cases; namely in any form in a war which he in conscience has concluded does not meet the tests fixed by his religion to permit participation in war. The Catholic religious teaching equally is that conscience, properly formed, is the means through which God's commands are perceived by the individual.

It follows that the Catholic conscientious objector to a particular war in refusing military service is submitting to the moral power of divine law as he perceives it in conscience under his religion, exactly as is the conscientious objector from a traditional pacifist sect who perceives divine law in his conscience, but applying the doctrines and teachings of his sect.

Thus, if the Catholic objector is to be denied a discharge from military service at the same time the member of the traditional pacifist sect is granted such a discharge, the difference in treatment can be based only upon a difference in the doctrines or teachings of the respective churches.

Sherbert V. Verner, 374 U.S. 398 at 402 (1963) emphasized:

> "The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such, *Cantwell v. Connecticut,* 310 U.S. 296, 303. Government may neither compel affirmation of a repugnant belief, *Torcaso v. Watkins,* 367 U.S. 488; nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities, *Fowler v. Rhode Island,* 345 U.S. 67; nor employ the taxing power to inhibit the dissemination of particular religious views, *Murdock v. Pennsylvania,* 319 U.S. 105; *Follett v. McCormick,* 321 U.S. 573; cf. *Grosjean v. American Press Co.,* 297 U.S. 233."

The court went on to hold it unconstitutional to compel the individual therein to choose between following the precepts of her religion and forfeiting a government benefit (unemployment compensation) on the one hand, or abandoning one of the precepts of her religion in order to become eligible for the government benefit, on the other hand. See 374 U.S. at 404.

The unconstitutionality is clearer in the present case than in *Sherbert v. Verner.* The government does not con-

tend herein that Negre, a Catholic, should alter his conduct to become eligible for discharge. Rather, the government asserts that Negre would be eligible for discharge if only he would disclaim his *belief* in the Catholic doctrine in respect of participation in war, and affirm his belief in other doctrines in respect of participation in war, such as doctrines of the traditional pacifist sects.

As the Second Circuit noted in *United States v. Seeger,* 326 F.2d 846 at 851 (2d Cir. 1964):

> "It could hardly be argued, for example, that the ability of Congress to deny an exemption to all conscientious objectors would permit Congress to limit that exemption to objectors of one particular religious denomination."

The Supreme Court in affirming the same decision emphasized:

> "The validity of what he believes cannot be questioned. Some theologians, and indeed some examiners, might be tempted to question the existence of the registrant's 'Supreme Being' or the truth of his concepts. But these are inquiries foreclosed to Government. • • • Local boards and courts in this sense are not free to reject beliefs because they consider them 'incomprehensible.' Their task is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious." *United States v. Seeger,* 380 U.S. 163 at 184-185 (1965).

Following the foregoing principles, in *United States v. Bowen,* F.Supp. (N.D. Cal, 1969) Judge Stanley Weigel held that the government's interpretation of § 6(j) was in violation of the establishment of religion clause of the First Amendment and also constituted a denial of equal protection of the laws. Judge Weigel stated:

"In denying conscientious objector status to Bowen based upon his religion opposition to the Vietnam War but permitting it to one whose religious opposition is to all wars, the effect of Section 6(j) is to breach the neutrality between religion and religion required by the mandate of the First Amendment.

"Section 6(j) must also fall before the constitutional prohibition against denial of equal protection of the laws. As has been seen, the Section permits exemption to religious 'absolute' objectors but denies it to religious 'selective' objectors. In this, it denies equal protection and, therefore, due process under the doctrine of *Bolling v. Sharpe,* supra. [347 U.S. 497 (1954)]."

Similarly, Judge Zirpoli in *United States v. McFadden,* 309 F.Supp. 502 at 506 (N.D. Cal., 1970) (appeal pending, No. 422, October Term), struck down § 6(j) as unconstitutional:

"In the case before the court the statute forces [the Catholic] to choose between following the precepts of his religion and going to jail or abandoning those precepts in order to avoid jail. Indeed, the case of [the Catholic objector] is stronger than Sherbert's, for not only is he faced with jail, but if he abandons his conscience he will be put in the position of possibly violating the fundamental precept of his religious belief —the killing of another human being in the cause of an unjust war.

"Such a burden upon the exercise of one's religion can have no place in a society built by men and women of all religions and persuasions. And although our history is not free from religious intolerance and persecution, it has always been the ideal of our forefathers to create a country where, as George Washington said: '[t]he liberty enjoyed by the people of these States of worshipping Almighty God agreeably to their consciences, is not only among the choicest of their blessings, but also of their rights."

Under the foregoing authorities therefore, Section 6(j) of the Military Selective Service Act of 1967 as construed by the government herein is unconstitutional as in violation of the Free Exercise and Establishment Clauses of the First Amendment, and the Due Process Clause of the Fifth Amendment which embodies Equal Protection of Law to members of all religious sects and beliefs, without any discrimination against any upon grounds of religious belief.

CONCLUSION

For the reasons stated, Section 6(j) and the corresponding Army Regulation should be declared unconstitutional if they discriminate against Catholics prohibited by conscience formed under Catholic religious training and belief from participating in military service.

In the alternative, Section 6(j) and the Army regulation should be construed to accord equal treatment to Catholic conscientious objectors as to members of traditional pacifist sects, and Negre should be discharged.

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